No. 14812

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES GRESHAM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

On January 19, 1955, an indictment was filed against the appellant in which the Grand Jury for the Southern District of California charged him with a violation of 18 U. S. C., Section 1709, in that he stole a letter, while a post office employee, which came into his possession intended to be conveyed by mail. The District Court had jurisdiction of the cause under Section 3231 of Title 28, U. S. C., which confers on all the District Courts original jurisdiction "of all offenses against the laws of the laws of the United States."

After a trial was held on February 25, 1955, the Honorable Ernest A. Tolin, Judge Presiding, the jury found the defendant guilty as charged on February 28, 1955. On March 31, 1955, a notice of appeal to this Honorable Court was filed. Thereafter, on April 29, 1955, a Designation of Portions of Record to be Contained in Record

on Appeal was filed by the appellant in the District Court. On May 23, 1955, this Court filed an order upon application of the appellant for the prosecution of the appeal on a typewritten record and for the consideration of the exhibits as part of the record without copying them into the record. A concise statement of the points on which appellant intended to rely was not filed with this Court upon the filing of the record as required under the rules of this Court, Rule 17.6.

Jurisdiction of this Court stems from Section 1291 of Title 28, U. S. C.

II.

The Statute Under Which the Defendant Is Being Prosecuted.

The indictment in this case is brought under Section 1709 of Title 18, United States Code, which provides in its pertinent part:

> "§1709. Theft of mail matter by postmaster or employee.
>
> "Whoever, being a postmaster or Postal Service employee, embezzles any letter, postal card, package, bag, or mail or any article or thing contained therein intrusted to him or which comes into his possession intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General; or steals, abstracts, or removes from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

III.
Argument.

The Government respectfully submits on the following grounds that the District Court did not err in his instructions to the jury. There is nothing in the record that shows that the remarks of the trial court were calculated to or did in any manner coerce, command or influence the jury to reach a verdict which prevented appellant from having a fair and impartial trial.

The trial of this matter was commenced on Friday, February 25, 1955, at 9:40 a. m. The proceedings consumed the entire Court day and from approximately 4:30 p. m. to 5:00 p. m., a substantial part of the instructions were given. (It appears that the time of 2:05 p. m. noted at the top of page 136 of the Reporter's Transcript of Proceedings relating partially to instructions given on the 25th is in error since the other portion of the transcript containing evidence given at the trial on the same day indicates that the Court finished taking evidence close to 4:00 p. m. This writer's recollection is also in accord with the latter time.) From approximately 4:00 to 4:30 p. m. oral argument was given followed by instructions to the jury. A recess was taken at 5:10 p. m. to Monday, February 28, 1955, for further instructions and deliberation. Thus, the trial appears to have consumed almost five hours, 12 witnesses having testified, 8 for the government and 4 for the defendant as shown by the 133 pages of transcript.

We find at page 133 of the Reporter's Transcript of Proceedings, that the Court stated to the jury on Friday, the 25th of February, 1955:

> "I am agreeable to putting it over to Monday morning. * * * we can have you in at 9:00 on Mon-

day morning and *you can have all day, if you need it, for discussion of the case.*"

The jury decided to choose the latter (rather than to deliberate on Friday evening) and came back on Monday morning, the 28th, to finish the case.

On Monday, February 28, 1955, the Court convened at 9:05 a. m. [Rep. Tr. p. 146.] Judging from the Reporter's Transcript of Proceedings, pages 146-148, the jury must have commenced its deliberation at approximately 9:30 a.m. on the 28th. (The Transcript of Record containing the minutes of the Court indicate that the bailiff was sworn at 9:09 a.m., but we do not take this to be the time the deliberation began since it is difficult to see how the colloquy could have taken place in only four minutes. [Rep. Tr. p. 7].) At any event, the jury was taken to lunch, presumably from 12 o'clock to 2 o'clock, and returned to Court for further instructions at 2:20 p.m. Thus, they deliberated between two and one-half to three hours, before they first came back into Court for instructions. The jury requested that the Court define reasonable doubt and circumstantial evidence. There were no exceptions to the instructions as given. [Rep. Tr. p. 154.] The third question was "please define what reasonable doubt of circumstantial evidence means." [Rep. Tr. p. 154.] No answer was given since it had been covered by the responses to the two previous questions. The fourth question was "Does it make any difference as to the amount of marked money found on the defendant?" [Rep. Tr. p. 154.]

The Court stated:

"It doesn't make any difference how much. * * * The evidence relating to the marked money was simply evidence of design to show that he had gotten

into the mails, otherwise, it was a prosecution theory, he wouldn't have had that marked money in his possession. Now, that was the prosecution theory. *Whether it is valid or not, it is for you to say. But that was the theory.*" [Rep. Tr. p. 155.]

The last question was:

"Did Assistant Superintendent at Palms Post Office bring to Superintendent's office one mail bag or mow many?" [Rep. Tr. p. 146.]

Counsel for both parties worked out an answer together which advised the jury that it had been only one mail bag which was brought into the post office." [Rep. Tr. p. 160.]

At the end of the answer to each question, the foreman of the jury indicated that the question had been answered to the satisfaction of the jury. [Rep. Tr. pp. 151, 154-155, 160.] There were no other questions from the jury. [Rep. Tr. p. 160.]

The Transcript of Record indicates that at 2:55 p.m. 30 minutes after they came in for instructions, the jury again retired to deliberate. [Rep. Tr. p. 7.]

At 4:00 p. m., one hour later, the jury returned to the courtroom. From the record, it appears the jury had deliberated altogether close to four hours when it came back at 4:00 p. m. At that time the Court said:

"*Don't tell me how the jury stands numerically,* but is there any way in which we can help you."

The foreman advised the Court that he did not think so since some of the jurors did not see "eye to eye" and he did not believe the "barrier could be broken through." There followed further instructions from the Court to the jury and a discussion with the foreman and other mem-

bers of the jury which appears to be accurately reproduced in appellant's opening brief. Therefore, it will not be again reprinted herein. [Rep. Tr. pp. 161-166.] However, appellee wishes to emphasize certain portions of this discourse. As stated above the Court specifically instructed the jury not to state how the jury stood numerically. He further stated:

> "Won't you please go back to the jury room and each of you bear in mind that the jurors who are opposed to your way of thinking were selected in the belief that they were as reasonable as you and you as reasonable as they. Start out fresh and see if you can't come to a verdict. If you can't I will discharge you shortly after 5:00. But being the quality people you are, I take it that you will be able to get together."

However, the Court admonished the jury as follows:

> *"You should bear in mind that no one should surrender a firm conviction,* if you have that, but you ought to recanvass your thoughts, all of you. Each and everyone of you should canvass your thoughts regarding the case, in the lights of the facts that other people who are presumptively reasonable as you feel otherwise. Try to talk it over again and we will keep you here until a little after 5:00." [Rep. Tr. p. 164.]

The Court then asked each member of the jury whether he or she thought there was a possibility an agreement might be reached. Five jurors out of the 12 indicated they believed an agreement might be accomplished. The Court did not indicate which agreement would be desirable, he only stated "do you think * * * there is a possibility you might agree." [Rep. Tr. p. 164.] There is not one word in all his remarks which could be taken to mean that the jury bring in a verdict of guilty.

The seven jurors who indicated they doubted any agreed could be reached would logically seem to have been divided on their opinion as to a verdict of guilt or acquittal. But we do not even have any sure way of knowing how the other five jurors stood particularly in view of Juror Condon's remark, "I still have faith in the human element." In other words, it could not be said in any light to have been a poll of the jurors as to how they stood numerically as to acquittal or guilt, as claimed by appellant. Any such position is actually the result of sheer conjecture and surmise. All of the cases cited by him on page 9 of his opening brief relate to numerical polls of juries as to how they stood on the question of conviction or acquittal. The trial court here was merely attempting to ascertain whether or not a true deadlock existed, without any hope of reaching an agreement. Certainly it was within his province to make such an inquiry and to send the jurors out again when five of them, regardless of how they stood for guilt or acquittal, indicated there was a possibility of reaching an agreement.

After receiving the above instructions from the Court, the jury returned to deliberate further. At 4:40 p. m., 20 minutes later, which was not a short period of time compared to the total period consumed in deliberation, they returned with a verdict of guilty. They clearly did not respond with the verdict because of any threat of being kept unduly by the Court until an agreement was reached. As set forth above, the Court had initially indicated that the jury could have all day Monday as needed, and, again on Monday, a little after 4:00 p. m., he told them that if they could not agree on a verdict, they would be discharged shortly after 5:00 p. m. that day. The Court's exortation had been firmly put as follows: "* * * No one should surrender a firm conviction * * *." His

suggestion to them, in view of the fact that some jurors thought there was a possibility of reaching a verdict was to

> "* * * canvass your thoughts regarding the case, in light of the fact that other people who are presumptively reasonable as you are feel otherwise. Try and talk it over again * * *." [Rep. Tr. p. 163.]

All of the questions, except the last, which were asked by the jury indicated they had probably spent the morning pondering instructions of law upon which they were confused. Thus, it was only reasonable for the Court to request them to discuss the matter further, particularly since the case was not long or complicated and the jury had not been out more than a few hours altogether. It is apparent that one or more of the jurors upon retiring to the jury room for the last time reconsidered the position which he or they had taken and decided that it had been an unreasonable one and that, in accordance with the Court's instructions on circumstantial evidence and reasonable doubt and all of the evidence in the case, the verdict must be one of guilt.

Recently on April 19, 1955, this Court affirmed a conviction in a case which had been tried before the Honorable William C. Mathes, Judge of the District Court for the Southern District of California, Central Division, in the case of *Salvador Vernal-Sazueta v. United States of America,* No. 14,598. During the course of that trial, which was somewhat more complex in nature than the instant case, the Court at various times instructed the jury concerning their conduct in arriving at a verdict. Judge Mathes stated as follows:

> "In the course of your deliberations, do not hesitate to re-examine your own views and change your

opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for mere purpose of returning a verdict."

Thereafter the jury returned again unable to agree. The Court further told them:

"Remember at all times that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of the evidence, but remember always that after full deliberation and consideration of the evidence, it is your duty to agree upon a verdict, if you can do so, without violating your individual judgment and your conscience."

Originally, after having deliberated for about two hours, the Court received a note from the foreman stating that it appeared the jury could not agree to a unanimous verdict since no juror had changed his or her mind since the first ballot. The jury finally reached a verdict at approximately noon the next day, but, before sending them home for the night, the Court instructed them as follows:

"* * * the defendant should not be put to the expense of trying this case again. The government should not be put to the expense of trying this case again. If I did not feel that you people—I am not criticizing you; sometimes juries get off to a strange start. But I just do not see any reason why you cannot find the truth as to the facts here in this case.

"Now I don't want you to feel that you are under any pressure, you are prisoners and you are going to have to stay until you reach some kind of verdict. But I do want you to give yourself every opportunity so that the defendant, as well as the Government, won't have to try this case again. You see, it is ex-

> pensive to both sides; to say nothing of the ordeal of going through, for everybody concerned, and the witnesses who are involved. It takes enough time to try each case once."

The facts of that case, although more complex than the one under consideration herein, were not complicated in the real sense of the word. But the trial court after years of experience with individual jurors and jurors as a panel must have developed a realization and an awareness of the problems that a jury encounters during the course of its deliberation in attempting to achieve a just verdict. For some of them it may be their first time of participation in such a proceeding and the trial court might well determine that some further deliberation might be effective in helping them to see their duty in its true perspective. The Court might also feel that the jury was not diligent in seeking to settle its differences. In the case at bar one of the jurors, or perhaps more than one, may have realized that a position taken had been completely unreasonable or based upon a misconception of fact or law. Such an awareness might have dawned within a few seconds after the jury returned for the final time to the jury room. It may have been a word or some phrase which was spoken by one of the other jurors which suddenly convinced the one or ones who changed their mind that they had been laboring under a misapprehension or upon an unreasonable basis.

The government respectfully submits to the Court that all of the cases which have been cited by appellant in this opening brief on pages 7, 8 and 9 can be distinguished from the facts in this matter. In *Kesley v. United States,* 46 F. 2d 453 (5 Cir., March 5, 1931), the District Court

was dealing with a "hung" jury. He stated that it was apparent to him some of the jurors were violating the sacredness of their oaths and further that there was very little doubt as far as the facts were concerned. The jury came in with a verdict of guilty within a few minutes thereafter. It is interesting to note that the Court of Appeals at page 454 stated *"The Judge may urge the minority to carefully consider the fact that they are in the minority in reviewing the correctness of their position* * * * but comments, not upon the evidence, but reflecting on the jury are not permissible. * * * Much more serious is an imputation by the Judge that some of the jurors are forgetting their oaths. It might even be interpreted as a threat of punishment for contempt of court." In other words, in this case the Court had imputed that the jury as a body had forgotten its integrity and even worse might be subject to punishment as for contempt of court. There is no such question in this case.

On page 8 of his brief, appellant cites a case of *Wissel v. United States,* 22 F. 2d 468 (2 Cir., Nov. 14, 1927). In that case the Court had first instructed the jury in part "* * * I feel the case is of such importance that it will be necessary to keep you together until you can have agreed, or until you do agree upon a verdict. You may retire, gentlemen, and return your verdict." In spite of this strong statement that they would be kept together until a verdict would be agreed upon, the Court of Appeals stated an exception to the instruction was without merit for no complaint could have been made to its fairness and accuracy with respect to the jury's duty. However, subsequent to the above charge, the Court had instructed the jury further, which the Court of Appeals

held resulted in the effect of telling them that a verdict of not guilty was setting at defiance law and reason. "It was by indirection doing what the law is adjudged to do directly—direct a verdict of guilty." In the within case, there was no indication whatsoever that the Court had made any reference, either directly or indirectly, to the kind of verdict which the jury should bring in. His only effort was to suggest that they endeavor to reach an agreement. Further, he promised to discharge them at the end of the Court day if no such accomplishment was effected. In the case of *Peterson v. United States,* 213 Fed. 920 (9 Cir., May 11, 1914), Judge Dietrich considered a specification of error involving the first count which he stated was "the only one we need now consider." However, later in the opinion, he did turn to another instruction which had been complained of. Again, this holding can be distinguished from the case under consideration herein. The foreman of the jury had reported that they had been unable to agree as to two of the defendants and the Court further instructed as set forth on page 924 of the opinion. Judge Dietrich remarked on the same page:

> "And, in the most favorable view that can be taken of it, the evidence was doubtfully sufficient to warrant a conviction. Already one jury had been unable to reach an agreement, and this jury had spent many hours in a vain attempt to get together. * * *
>
> It appears here inquiry was first made of the jurors as to how they were divided, and it was thereupon disclosed that they stood 5 to 7. * * *"

The Court cited the *Burton* case which had reversed because of a similar inquiry. After discussing the disclosure

here of a numerical division as to guilt or acquittal the Court stated that:

> "But here, without cautioning the jurors against yielding their honest, conscientious convictions, whatever they may have been, to mere numbers or to considerations of economy, the presiding Judge unqualifiedly told them that 'the case should be finally disposed of as to all' defendants. * * * The Court might very well have expressed the hope for such an agreement, but it is difficult to conceive what basis there was at that juncture for believing that the jury could honestly agree. It is to be borne in mind that nowhere did the Court make it clear that, however desirable it might be to avoid another mistrial and finally to terminate the prosecution, an agreement should not be reached in violation of the honest conviction of any one of the jurors."

In the instant proceeding, Judge Tolin had carefully instructed the jury more than once that the individual jurors should not surrender an honest conviction simply because a large number of jurors might be of a different persuasion.

In *Edwards v. United States,* 7 F. 2d 598 (8 Cir., July 28, 1955), the jury had deliberated for 24 hours after submission of the case. After being brought into Court they reported their inability to agree and that they had made no substantial progress. The Court had then asked the foreman whether the dispute involved a matter of law and he was advised in the negative. However the Court went ahead and treated it as though the dispute involved a matter of law and, as stated by the Court of Appeals, "concluded with language which we think at least in some degree calculated to coerce a verdict. It

must be remembered that the facts were not complicated and the dispute must have necessarily been drawn to a very fine line. The jury had deliberated for 24 hours and reported substantially no progress; that is 'we are about where we started.' " As we have pointed out previously, Judge Tolin endeavored to answer the jury's questions as concisely as possible and, in fact, no exceptions were noted to the instructions relating to reasonable doubt and circumstantial evidence. He constantly emphasized that the jury should bear in mind that no one of them should surrender a firm conviction merely because others in the majority might be of a different opinion.

In *Boyett v. United States,* 48 F. 2d 482 (5 Cir., April 8, 1931), the Court stated that "when it is apparent that doubt exists in the minds of the jury, after having received the charge of the Court and returned to deliberate, in delivering additional charges the Judge should exercise caution and refrain from indicating to the jury his own opinion as to the guilt or innocence of the defendant. It is also his duty to refrain from any intimidation or coercion of the jury." Here, there was at least substantial evidence to support the conviction of the defendant and in fact it appears that the evidence was overwhelming against him. The questions asked by the jury seemed to indicate that their discussions had revolved almost completely around matters of law. As Judge Tolin stated "it seems to me that the main difficulty you have is that the case hangs entirely on circumstantial evidence." [Rep. Tr. p. 162.] The Court then went on to state that the law makes no distinction between circumstantial and other evidence, "except that in order to warrant a verdict of guilty the evidence must be consistent only with guilt, and inconsistent with any reasonable hypothesis of innocence." It was shortly after this statement that the

jurors went out to deliberate for the last time. It may have been that previously they had not realized circumstantial evidence which is consistent only with guilt would be sufficient to justify a verdict of guilty. With this proper instruction on the law, it was then possible for them to discuss the facts accordingly.

In *Suslak v. United States,* 213 Fed. 913 (9 Cir., May 4, 1919), Judge Dietrich again considered the propriety of instructions given after the jury had been out for some time. The judgment of conviction was affirmed.

The instruction given had been as follows: The Court held at page 919:

> "It is not an uncommon practice, and it is entirely within the discretion of the court, to recall the jury for the purpose of giving additional instructions. Perhaps the language employed is as strong as should ever be used in impressing upon a jury their duty, if possible, to reach unanimity by a fair consideration of each other's arguments, but in its general purport and spirit the instruction is not out of harmony with the common practice, and is abundantly supported by the decided cases. Allis v. United States, 155 U. S. 117."

In *Shea v. United States,* 260 Fed. 807 (9 Cir., Oct. 6, 1919), Judge Gilbert of this Court once more affirmed, although error was assigned to additional instructions given after deliberation had commenced. The Court stated at pages 808 and 809:

> "We do not think that the instruction here in question was more coercive or more invasive of the province of the jury than the instructions to the jury in United States v. Allis (C. C.), 73 Fed. 182, which was approved in Allis v. United States, 155 U. S.

117, 15 Sup. Ct. 36, 39 L. Ed. 91, where the court said:

'It is a familiar practice to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment.' Again in Allen v. United States, 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528, the court approved an instruction of the court in which the jury were told it was their duty to decide the case if they could conscientiously do so, and that they should listen, with a disposition to be convinced, to each other's arguments; that in case the larger number were for conviction, a dissenting juror should consider why, if his doubt was a reasonable one, it made no impression upon the minds of so many other men equally honest and equally intelligent with himself.

* * * * * * * *

In Suslak v. United States, 213 Fed. 913, 130 C. C. A. 391, this court reviewed and held proper instructions to the jury not dissimilar from those which are here under review.

The plaintiff in error relies upon Peterson v. United States, 213 Fed. 920, 130 C. C. A. 398, in which we held certain instructions to the jury reversible error. In that case the court had inquired of the jurors as to how they were divided, and was informed that they stood five to seven; thereupon the court said to the jury, among other things, 'The government has a right * * * to a verdict without further expenditure of time and money,' and in conclusion the court expressed the belief that the jurors

could honestly come to an agreement. We adverted to the fact that nowhere did the court make it clear that, however desirable it might be to avoid another trial and finally to terminate the prosecution, an agreement should not be reached in violation of the honest conviction of any one of the jurors.

* * * * * * * *

But at the same time the court charged the jury that if they had a reasonable doubt of the defendant's guilt they should acquit him, and took pains to impress upon the jury that nothing that had been said should be understood as seeking to influence the conscientious and honest opinion which they or any one of them as reasonable men might entertain."

Conclusion.

It is respectfully submitted that the trial court did not err in its instructions to the jury and therefore the judgment of conviction should be affirmed.

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